precisely the same distinction. The first conclusion that must be drawn from this language is that a prohibition on resale is not, under any circumstances, a reasonable condition or limitation. Therefore, every service offered by a LEC must be available for resale, including flat-rate and residential services.

Second, although Congress delegated to this Commission (with one exception, as noted in the next paragraph) the determination of what is a "reasonable" condition or limitation on resale, the clear intent of the 1996 Act and of Sec. 251(c) in particular was to promote competition, so that conditions and limitations on resale should be strongly disfavored. The carrier proposing any such condition or limitation should have the burden of demonstrating that it is reasonable and nondiscriminatory, and any doubt on these issues should be resolved against the proponent. As noted in para. 176, the Commission generally has disallowed tariffs that prevent carriers "from purchasing high volume, low price offerings to resell to a broad pool of lower volume customers." This policy has proven sound in the interexchange market and should be extended to the local exchange market. Therefore, ILEC tariff provisions restricting resale based on volume aggregation (for example, restricting resale to a single customer, a single building, or a limited geographic area) should be deemed *per se* unreasonable. Any state laws or policies requiring such restrictions are inconsistent with the Act, and must be preempted.

Third, Sec. 251(c)(4)(B) does authorize the Commission to prescribe regulations under which a State commission may restrict resale of particular services to certain categories of subscribers. The clear intent of this provision was to allow the Commission to preserve universal service subsidies for certain classes of customers and to prevent arbitrage through resale of a subsidized service to customers who do not qualify for the subsidy. The Commission should effectuate this purpose, but should not allow this provision to be used by ILECs as a "loophole" to justify otherwise unreasonable resale limitations. After a relatively brief transition period in which resale of all residential services should be limited to residential end users, the Commission should strictly limit the application of this "category" exception to those services (if any) receiving explicit universal service subsidies (*e.g.*, Lifeline service) under the policies to be adopted in CC Docket No. 95-45. If the Commission adopts the consensus proposals in the universal service docket, the vast majority of universal service subsidies will be end-user specific, portable and, therefore, no longer a source of generic funding to ILECs. In this new environment, all ILEC services should be priced to cover relevant costs and no service should be exempted from resale.

The Commission also seeks comment on whether an ILEC may avoid making a service available for resale by withdrawing it altogether. This question is undoubtedly prompted by U S West's recent effort to do exactly that in the case of its "Centrex Plus" service, which has been used by a number of local service resellers in several states. As a general matter, the ability of an ILEC to withdraw an offering of a local exchange service should be governed by State, not Federal law; but Sec. 251 does impose certain obligations on the ILEC that would override State law in some circumstances. In particular, because Sec. 251(c)(4)(B) prohibits any "discriminatory" condition or limitation on resale, an ILEC may not restrict a service in such a way as to discriminate among resellers, or between resellers and end users taking similar service. Thus, an ILEC might be able to withdraw a service entirely if its action affected all users uniformly, but it may not "grandfather" the service so that some resellers can continue in business while others are precluded from entering the market. Withdrawal of a service might also be an unreasonable limitation of resale if the ILEC does not offer any reasonable substitute service to which resellers can subscribe.

c. Pricing of Wholesale Services (¶¶ 178-183)

As explained in previous sections, MFS encourages the Commission to adopt a market-driven pricing strategy. In order to be successful, this strategy must be applied consistently to all services, all network elements, and all constituents of the market. In the context of wholesale prices, therefore, the Commission should avoid adopting any pricing standards that would given incorrect or inefficient price signals to resellers and thereby distort the operation of the market.

In establishing uniform rules for determination of wholesale rates, the Commission should adhere closely to the requirements of the Act and should not grant any special preferences or advantages to resellers. Here, the Commission is not only concerned with the relative positions of the ILECs and new entrants, but must also strike a balance between the concerns of facilities-based competitors and pure resellers. (MFS, it might be noted, is both—it is the largest facilities-based competitive provider of local exchange service, but also the largest reseller of such service.) As stated above, resale will play a critically important role in assuring the efficient operation of newly competitive markets; but facilities-based entry is also indispensable in creating the competitive pressures that will drive these markets.[80] As shown in Section I of these comments, Congress

[80] In fact, there would be no need for regulation of wholesale prices in a market in which fully effective facilities-based competition existed. Facilities-based carriers would compete against each other to offer their services to resellers, much as is the case today in the interexchange market, and market forces would therefore be effective to produce efficient prices. The Commission should view mandatory wholesale pricing as an interim measure only, and should be prepared to exercise its forbearance authority under Section 10 when it finds that sufficient facilities-based competition exists in particular markets to protect the interests of resellers.

specifically intended the 1996 Act to stimulate investment in competitive facilities; resale alone, therefore, is necessary, but not sufficient, to achieve the legislative goals.

The text of the 1996 Act clearly states that avoided costs must be determined on a service-by-service basis — that is, the State commission must calculate the actual rate of each service to be resold. Sec. 252(d)(3) provides that a

> State commission shall determine wholesale rates on the basis of retail rates charged to subscribers *for the telecommunications service requested*, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(Emphasis added.) Determining wholesale rates for resold local service on any basis other than service-by-service would frustrate congressional intent. Therefore, the proposals discussed in para. 182 must be rejected.

Also, Sec. 252(d)(3) provides that wholesale rates are to exclude costs "that will be avoided" through wholesale provision of the requested telecommunications service. Congress's use of the word "avoided," rather than "avoidable," requires resellers to demonstrate the actual, not potential, costs avoided when telecommunications services are purchased at wholesale. Congress intended to limit the ability of imaginative resellers to argue for a wholesale discount greater than the cost savings that actually will be experienced by the providing carrier. This requirement precludes adoption of any "presumed" level of avoided cost as suggested in para. 181.

Just as Secs. 252(d)(1) and (2) require the Commission to eschew traditional ratemaking principles and to base pricing decisions for interconnection, unbundled elements, and transport and termination of traffic on economic costs, so subsection (d)(3) requires the use of economic costs rather than arbitrary historical or embedded cost studies in determining "costs that will be avoided" in setting wholesale rates. The cost that will be avoided is, quite simply, the difference between the total cost incurred to provide the service on a retail basis and the total cost incurred to provide it on a wholesale basis. This calculation must take into account not only cost savings to the LEC in providing the service, but also the additional costs incurred by the LEC in doing so. For example, a LEC offering its services to resellers may incur costs for the transmission of billing data, resale customer contact operations, handling the accounts and requests of resellers, and handling the churn in service providers chosen by end users that will surely result from local competition. In addition, it may be necessary to increase retail marketing efforts to distinguish the services of the facilities-based competitor from the reseller. All of these activities involve greater costs which may offset some or all of the costs otherwise avoided by providing services at the wholesale level.

The Commission should explicitly reject the suggestion in para. 180 that avoided costs might include some share of general overhead or "mark-up," as well as the similar (and somewhat redundant) suggestion in para. 181 to allocate some common costs to "avoided" activities. General overhead consists of joint and common costs that are attributable to more than one service and, in the interest of efficiency, are recovered from all of these services. These costs will continue to be incurred regardless of whether the ILEC provides its services on a wholesale or a retail basis.[81] Since joint and common costs will not be avoided in fact, they cannot be removed from wholesale rates under the pricing standard of Sec. 252(d)(3).

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[81] By definition, if a cost *is* avoided when the ILEC ceases to provide a particular service, then it is a direct cost of that service and not a joint or common cost.

(3) Relationship to Other Pricing Standards (¶¶ 184-188)

As discussed at pages 50 *et seq.* above, a coherent scheme of unbundling, resale, and market-driven pricing is required in order to achieve fully the pro-competitive purpose of the 1996 Act. One necessary element of that scheme is the requirement that the price of every retail ILEC service be set equal to, or greater than, the sum of the prices of the component network elements used in providing that service. Indeed, without this requirement, there would be no effective upper limit on the rates that ILECs might charge for access to network elements. An ILEC could simply charge an arbitrarily high rate for the unbundled elements, while charging lower rates to end users for bundled services that use the same elements. No competitive entrant would ever buy the unbundled elements under this scenario, because it could never hope to provide the bundled service at as low a price as the ILEC. MFS' proposed pricing rule is therefore essential to permit the effective operation of market forces in setting unbundled element prices.

C. Obligations Imposed on "Local Exchange Carriers" by Section 251(b)

1. Resale (¶¶ 196-197)

MFS generally agrees with the Commission that restrictions on resale of local exchange services should be discouraged. The statutory language concerning resale restrictions for all local exchange carriers in Sec. 251(b)(1) is virtually identical to Sec. 251(c)(4)(B) applicable only to ILECs. Therefore, a resale restriction imposed by a non-incumbent LEC should be presumed unreasonable, except that any condition or limitation of a type that has been found reasonable for ILECs should be presumed reasonable for other LECs as well.[82]

5. Reciprocal Compensation for Transport and Termination of Traffic

c. Definition of Transport and Termination of Telecommunications (¶¶ 230-231)

The term "transport and termination of telecommunications" in Sec. 251(b)(5) must be read in context. This subsection provides that "each local exchange carrier" has the "duty to establish *reciprocal* compensation arrangements for the transport and termination of telecommunications." (Emphasis added.) The qualifier "reciprocal" implies that the duty extends only to arrangements between local exchange carriers, not between a local exchange carrier and another telecommunications carrier that is not a LEC; and, therefore, these arrangements only apply to those "telecommunications" that are carried by LECs, namely end-user and carrier access traffic within a LATA. There is no basis in the statutory language for excluding from the scope of this provision arrangements between neighboring, non-competing LECs. Indeed, since the duty imposed by this provision expressly applies to *every* LEC, it would be contrary to the express intent of Congress to exclude from its coverage any reciprocal compensation arrangements between any LECs.

The Commission also requests comment on whether reciprocal compensation arrangements should be segregated into "transport" and "termination" elements for pricing purposes. Nothing in the statutory language or the legislative history, however, supports such a distinction. To the

[82] For example, if an ILEC offers lower rates for residential subscribers than for business service, and is allowed to prohibit the resale of the residential service to business customers, then the ILEC's competitors will have a strong competitive incentive to offer a similar two-tiered rate structure. The competitors would then be just as vulnerable as the ILEC to arbitrage of the lower residential rate, and should have the same ability to restrict such resale.

contrary, it may be noted that Sec. 252(d)(2)(A)(i) refers to the "recovery . . . of costs associated with the transport and termination of calls[,]" while Sec. 252(d)(2)(A)(ii) refers to "a reasonable approximation of the additional costs of *terminating* such calls," (emphasis added), suggesting that Congress considered the transport and termination functions to be equivalent or at least substantially overlapping.

In this respect, there is an important distinction between reciprocal compensation arrangements and access to unbundled elements. In an unbundled access arrangement, the requesting carrier specifies the particular ILEC facilities to which it desires access, and integrates those facilities into its own network. In a reciprocal compensation arrangement, however, the carriers are exchanging *services* (*i.e.*, termination of calls) over their networks rather than providing access to particular, identifiable facilities. *See* note 51, above. Because an interconnecting carrier does not specify the facilities that will be used to transport or terminate its traffic, the charges for this function should not depend on the other carrier's choice of facilities.

Some ILECs have sought to subdivide "transport and termination" into subcategories as a means of applying non-reciprocal or asymmetric rate structures to these arrangements. For example, ILECs in New York and Maryland were able to persuade State regulators to approve on an interim basis "two-tier" termination rate structures under which one rate applies for traffic routed through an ILEC tandem switch, while a lower rate applies for traffic directly trunked to an ILEC end office.

Because non-incumbent LECs typically do not today operate separate "tandem" and "end office" switching hierarchies, these rate structures are inherently non-reciprocal.[83]

Further, a two-tier rate structure would not be consistent with the pricing standard of Sec. 252(d)(2)(A), which requires that rates be designed to allow "mutual and reciprocal recovery of costs" based upon "a reasonable approximation of the additional costs of terminating such calls." This standard requires a single rate structure that is not dependent on the particular network architecture or routing chosen by either carrier. A rate structure tailored to the network design of one carrier would almost certainly not provide "mutual and reciprocal" recovery to the other carrier. For example, the two-tier rate structure approved in Maryland is designed to allow the ILEC to recover costs associated with its tandem switches and the inter-office trunks connecting those tandems to end office switches; but it makes no allowance for the additional backhaul costs that will be incurred by a new entrant that does not have separate tandem switches.[84]

As discussed in more detail at page 80, below, the requirement that reciprocal compensation rates be based upon "a reasonable approximation of the additional costs," coupled with the prohibition on requiring actual cost studies, dictates that these rates be based on the incremental costs

[83] In New York, the "tandem" rate does apply reciprocally to traffic terminated by the non-incumbent LEC, but the latter carrier is also required to offer alternative interconnection options that would allow the ILEC to reduce its termination cost. In Maryland, however, the lower "end office" rate applies to traffic terminated by a non-incumbent LEC.

[84] Typically, MFS uses a single integrated tandem/end office switch to serve a geographic area comparable to that served by an ILEC tandem and multiple end offices. The use of a single centralized switch requires the deployment of additional transport facilities to bring traffic from all points within the service area to the switch, but the cost/capacity relationships of modern switching and transport technologies make this a more efficient design than deploying multiple switches with less transport. Therefore, although MFS does not incur the tandem switching costs that the ILECs do, it incurs additional transport costs to connect all points on its network to the centralized switch.

of an efficient provider, not on the "actual" or "historical" costs of any particular provider. Economic analysis suggests that over time, all providers within the same market will tend to adopt the most efficient technology due to their self-interest in minimizing their costs and maximizing their profits. Therefore, the long-term efficient cost of transporting and terminating traffic should be identical for all providers, based upon their adoption of the most efficient technology, even if their short-term costs based upon today's technology are different; and the Commission should seek compensation structures that reinforce, not interfere with, incentives to increase efficiency.

An artificial distinction between "tandem" and "end office" termination, or any other rate structure that seeks to distinguish "transport" from "termination," would eliminate the reciprocity required by Congress and give LECs an opportunity to tilt the balance of payments through their network design decisions. For example, if (as suggested in para. 231) dedicated transport links between a carrier's switch and the meet-point were to be priced on a flat-rated basis, the carrier would then have an incentive to route traffic through a switch far away from the meet-point (regardless of whether this would be economically efficient) in order to increase its revenue from dedicated transport (and correspondingly increase its competitor's expenses).[85] In order to avoid uneconomic incentives of this nature, the Commission should interpret "transport and termination" as an indivisible unit that will be subject in its entirety to reciprocal (and, as discussed below, symmetric) pricing.

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[85] In fact, the Commission has recognized that technological developments have dramatically reduced the distance-sensitivity of network costs. *See, e.g., MTS and WATS Market Structure, Amendments of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board*, CC Docket Nos. 78-72, 80-286, 86-297, Report and Order, 2 FCC Rcd. 2639, 2642 (1987). Accordingly, there is little justification for imposing interconnection charges that depend on distance or on the geographic point of interconnection.

d. Rate Levels (¶¶ 232-234)

In response to paras. 232-233, MFS believes that Congress was unambiguously clear in establishing different pricing standards in Sec. 252(d)(1) and (d)(2), and there is no reasonable argument that the statute could be construed to treat these two standards as interchangeable. Facilities used for traffic exchange pursuant to Sec. 251(b)(5) cannot be made subject to rates based on the Sec. 252(d)(2) pricing standard.

Para. 234 requests comments on a variety of issues relating to implementation of Sec. 252(d)(1). MFS urges the Commission to adopt rules requiring that reciprocal compensation rates be based upon a reasonable estimate of the long-run incremental cost, to a provider using the most efficient available technology, of terminating traffic received from other providers on a LATA-wide basis. The LATA is the reasonable geographic unit to use for this purpose—a larger unit would be unrealistic because the Bell Operating Companies are prohibited, at least for the time being, from transporting traffic beyond a LATA boundary; while smaller units would be unrealistic because ILEC networks within a LATA generally are operated as an integrated unit. ILECs currently interconnect within their own networks and with neighboring ILECs for the transmission of traffic on a LATA-wide basis, so Sec. 251(c)(2)(C) and (D) prohibit them from requiring other carriers to interconnect on any less favorable basis. *See* note 75, above.

Sec. 252(d)(2)(B)(ii) prohibits the Commission and any State from conducting "any rate regulation proceeding" to determine transport and termination costs, or from requiring the performance of any cost studies. This provision suggests that Congress intended for these costs to be set at economically optimal levels, rather than at levels dictated by any existing provider's "actual" or "historical" network design and costs. This conclusion is reinforced by the reference to "additional costs" in Sec. 252(d)(2)(A)(ii), which clearly seems to incorporate the economic concept of efficient pricing based on marginal costs. This is a sound policy choice, because use of efficient prices will provide all carriers with an economic incentive to modernize their networks and adopt the most efficient technology, as well as to use the most efficient means available to terminate their competitors' traffic.

The Commission's rules therefore should require that compensation for transport and termination of traffic under Sec. 251(b)(5) not exceed a reasonable estimate of the incremental cost that would be incurred by a provider using optimal technology. Rates may not be based on either interstate or state access charges, because these rates have been the outgrowth of rate-of-return proceedings rather than estimates of economic costs; nor may they be based on any ILEC's embedded or historical cost studies, whether performed before or after the enactment of the 1996 Act. Indeed, rates may not be based on the typical ILEC incremental cost study, because these studies generally assume the existing network design will remain fixed in perpetuity, and are inconsistent with the Act's requirement for an approximation of the optimal economic cost.[86]

e. Symmetry (¶¶ 235-238)

MFS believes that the requirement of symmetry in reciprocal compensation arrangements is one of the most important issues raised in the *NPRM*. Symmetry, as defined in para. 235, is not only consistent with the provisions of Sec. 252(d)(2), but in fact is compelled by them. Moreover,

[86] Obviously, however, it is impossible for any carrier's actual cost to be *lower* than the optimal level; therefore, an ILEC cost study could be used to set an upper bound on the possible cost, although it would not be a reasonable estimate of the optimal cost level.

symmetry is essential if new entrants are to have an opportunity to offer local exchange service on an economically viable basis.

As discussed in the preceding sections, Congress required that reciprocal compensation rates be "mutual and reciprocal" and based on a "reasonable approximation of additional costs," and expressly prohibited any requirement of actual cost studies. These interrelated provisions indicate Congress' intention that optimal economic costs, rather than actual or historical costs, should be used in setting these rates. While actual costs may vary from one carrier to the next, the optimal economic cost of performing the transport and termination function is the same for all carriers operating within the same geographic area. *Only* symmetric rates are "mutual and reciprocal,"[87] and only such rates are consistent with the provisions of Sec. 252(d)(2).

In para. 236, the Commission suggests that symmetric rates would be easier to manage than asymmetric rates. "Setting asymmetric, cost-based rates might require evaluating the cost structure of nondominant carriers, which would be complex and intrusive." This observation is correct, but also incomplete. Investigations into the cost structure of new entrants would not only be

[87] "Mutual" is defined as "1. possessed, experienced, performed, etc. by each of two or more with respect to the other or others; reciprocal . . . . 2. having the same relation each toward the other . . . ." *Random House Dictionary of the English Language, Unabridged Edition* (1981). Congress would not have used both the words "mutual" and "reciprocal" if it had merely intended them as synonyms for each other, so the word "mutual" must have been included to connote the similarity of the relationship between the two participants in the compensation arrangement.

administratively burdensome, complex, and intrusive, but also would violate the specific prohibition of Sec. 252(d)(2)(B)(ii).[88]

Asymmetric rates would place an intolerable burden on new entrants in the local exchange market. Asymmetric rates would tend to favor the ILECs, because of the greater bargaining power and greater access to information of these companies. Further, any imbalance in compensation would have a disproportionate impact on new entrants. The ILECs today serve nearly 100 percent of customers, and they will likely continue to have the largest share of the market for years to come.[89] Therefore, ILECs will be able to complete the majority of calls placed by their customers entirely over their own networks, and will incur reciprocal compensation charges only on a small fraction of their calls. By contrast, new entrants will incur these charges on the vast majority of their traffic. Any asymmetry in the rate levels would have a much greater proportionate impact on the new entrant's revenues and costs than on the ILEC's.

The supposed disadvantages of rate symmetry identified in para. 237 are illusory. First, the Commission suggests that different networks may have different cost characteristics, therefore

[88] Para. 236 also suggests that new entrants "may possess a degree of market power over the incumbent LEC" by controlling the access line needed to terminate a particular call, and therefore "may have an incentive and the ability to charge high rates to the incumbent . . . ." Although a rule requiring symmetric rates would eliminate this concern, the Commission is mistaken in characterizing control of an access line as "market power." If a new entrant did charge "high rates" for transport and termination of traffic on its network, the ILEC could seek to avoid paying these charges by marketing its local exchange services directly to end users and "winning back" the customers who were using the competitor's services. New entrants do not have captive customers, and therefore cannot exercise market power.

[89] Even in New York City, where switched local exchange competition was first introduced in mid-1993, NYNEX continues to serve several million access lines while MFS and other competitors collectively serve a few thousand.

requiring different rates. As MFS has already demonstrated, it would be poor policy to set rates based on the individual cost characteristics of particular customers' networks; any attempt to do so would also entail lengthy, complex, and expensive administrative hearings. Setting symmetric rates based on the costs of optimal technology will give all carriers an incentive to use the most efficient network design and to reduce their costs to the optimal level. Also, the Commission expresses concern that an ILEC "might be able to use its bargaining power to extract a symmetrical rate higher than relevant costs . . . ." This is a valid concern, but it is not a disadvantage of symmetry, because the same problem could occur even if rates were not required to be symmetric. The answer to this concern, as suggested above, is to require that the symmetric rate level be justified by a reasonable estimate of the optimal economic cost of transport and termination of traffic.

For the foregoing reasons, the Commission's rule should interpret Sec. 252(d)(2) as requiring symmetric rates for transport and termination of traffic, and should require States conducting arbitration or reviewing BOC statements of generally available terms to establish rates consistent with this requirement.

f. Bill and Keep Arrangements (¶¶ 239-243)

The Commission should not adopt rules requiring ILECs to enter into bill and keep arrangements, nor should it encourage the States to impose such arrangements through arbitration.[90] As explained in the preceding sections, the most efficient form of reciprocal compensation arrangement is one based upon the economic cost of transport and termination, and that cost almost certainly is not zero (as would be implied by a bill and keep arrangement). As the Commission notes in para. 242, bill and keep arrangements are likely to impair economic efficiency. In particular, local exchange carriers will have an economic incentive under bill and keep arrangements to market their services to customers that originate large numbers of calls relative to their incoming traffic volume. They would incur no cost for transport and termination of these calls on another carrier's network, but instead would force the other carrier to absorb that cost.[91] The Commission's goal, consistent with the intent of Congress, should be to encourage economically efficient competition for both

[90] The Commission expresses some doubt in para. 243 as to whether Sec. 252(d)(2)(B)(i) permits the imposition of bill and keep arrangements in arbitrated agreements, as opposed to permitting these arrangements solely in voluntarily negotiated agreements. Based on an analysis of the statute as a whole, there can be no real doubt that the purpose of this provision was to authorize the States to mandate bill and keep arrangements in their role as arbitrators (or in their review of BOC statements of generally available terms). MFS has discussed the relevant statutory provisions in detail in its Reply Comments in CC Docket No. 95-185 (filed Mar. 25, 1996), and requests that those Reply Comments be incorporated in the record of this proceeding to avoid duplication. Sec. 251(d)(3) bars the Commission from interfering with State policies that are consistent with the terms of the Act, and the Commission accordingly may not overturn State-imposed bill and keep arrangements or make them subject to any conditions (such as those suggested in para. 243). Nonetheless, these statutory provisions only *permit* bill and keep arrangements, and plainly do not require them.

[91] Of course, the converse is equally true. If the reciprocal compensation rate is set at a level greater than the actual cost of transport and termination, then carriers will have an incentive to market their services to customers who originate relatively few calls in order to minimize their reciprocal compensation payments to other carriers.

originating and terminating traffic, and this goal can only be achieved by setting rates close to economic cost.[92] The Commission therefore should not preclude or discourage States from complying with the requirement of the Act that they base rates on a "reasonable approximation" of economic cost.

g. Other Possible Standards (¶ 244)

The Commission notes that existing arrangements between neighboring ILECs may provide a basis for setting rate levels or ceilings for reciprocal compensation arrangements. As discussed earlier, arrangements between neighboring ILECs for the reciprocal transport and termination of traffic fall within the scope of Sec. 251(b)(5), and therefore are required to be filed with State commissions pursuant to Sec. 252(a) and (e). Under Sec. 252(i), the ILECs are required to make available the same arrangements contained in an approved agreement to any other requesting carrier, on the same terms and conditions. Therefore, any agreements between neighboring ILECs will impose a *de facto* ceiling on rates that these carriers can demand from any third party for similar transport and termination of traffic; if they demanded a higher rate, the requesting carrier could simply avail itself of the filed agreement. The Commission's rules should confirm the requirement that these agreements between ILECs be filed with State commissions and be made available to other carriers under Sec. 252(i).

[92] Although bill and keep arrangements may possibly satisfy this goal in circumstances where traffic is reasonably in balance, the costs of transport and termination are very small, and the administrative costs of imposing an explicit charge are substantial, it is not yet clear whether (or how often) all three of these conditions will be satisfied. For this reason, most of the States that have adopted bill and keep mechanisms to date have done so only on an interim basis, as noted in paras. 227 (n.306) and 240. This allows the States time to gather better information concerning traffic flows and costs, and recognizes that any efficiency losses due to imperfect pricing are likely to be minimal in the short term.

The Commission also inquires whether retail measured local service rates could be considered in establishing reciprocal compensation rates. In most jurisdictions, measured service rates (where they exist) have been set far above cost, so these rates (at current levels) would not provide any useful guidance as to the actual economic cost of transport and termination. If, however, the Commission adopts the market-driven pricing standards outlined earlier in these comments, it is reasonable to expect that local usage (and other rates) will move much closer to their actual costs. Under these circumstances, it would be appropriate to use local measured service charges as a standard of reasonableness for reciprocal compensation arrangements.

The Commission's rules should provide that any transport and termination rate exceeding one-half the applicable retail local measured service rate will be presumed unreasonable. If compensation were set at one-half the retail rate, then the originating carrier would receive net revenue equal to one-half the retail rate for its function of originating the call and routing it to the interconnection point, and the terminating carrier would receive an equal amount for its function of routing the call from the interconnection point to the terminating customer. As a general rule, the costs of call origination and billing can be presumed to be equal to the costs of transport and termination (bearing in mind that the Act directs the use of a "reasonable approximation" of costs rather than a precise measurement), so that the retail price of a "half-call" can be used as an approximation of the transport and termination cost.

D. Duties Imposed on "Telecommunications Carriers" by Section 251(a) (¶¶ 245-249)

In para. 246, the Commission inquires as to whether a service provider may qualify as a "telecommunications carrier" for some purposes but not others. MFS submits that this question is definitively answered by Sec. 3(44), quoted in para. 245, which provides that "[a] telecommunications carrier shall be treated as a common carrier under this Act *only to the extent* that it is engaged in providing telecommunications services . . . ." (Emphasis added.) An entity that provides telecommunications services may also engage in other lines of business, which might range from providing information services to selling customer premises equipment to issuing credit cards to selling music CDs; but Congress expressly directed that such an entity would be subject to regulatory oversight only to the extent that it provides telecommunications services (as defined in Sec. 3(46)). Nonetheless, a carrier that uses telecommunications services in providing any of these non-regulated services remains subject to the Communications Act with respect to the use of its network services. In particular, ILECs are required to provide to other carriers *on a nondiscriminatory basis* any network elements that the ILEC uses in the offering of non-regulated services, or provides to end users or other customers for these purposes.

H. Advanced Telecommunications Capabilities (¶ 263)

MFS believes that the unbundled access requirements of Sec. 251(c)(3) can and should be implemented in a way that promotes the deployment of advanced telecommunications capability, consistent with Section 706(a) of the 1996 Act. As discussed in more detail in previous sections, ILECs should be required to unbundle all network facilities and equipment upon request, and should not be permitted to dictate the technology to which another carrier will have access.

In its recent reply comments in the Universal Service proceeding, CC Docket No. 95-45, MFS urged that all LECs should be required, as a condition of eligibility for universal service subsidies, to meet existing network modernization standards for rural telephone companies. Among other things, these standards require that rural telephone companies develop a plan for upgrading their subscriber loops to carry data at a rate of at least 1,000,000 bits (one megabit) per second.[93] The "CSA" loop standards referenced at page 44, above, will provide transmission plant capable of meeting the one megabit/sec capacity requirement. Since ILECs should be required to upgrade their plant to CSA standards for purpose of meeting their obligations to their end users, they should have a similar requirement to make available upgraded facilities on a nondiscriminatory basis for use by requesting telecommunications carriers. For the most part, this requirement will not cause any changes in interconnection locations or facilities.[94]

III. PROVISIONS OF SECTION 252

A. Arbitration Process (¶¶ 264-268)

With respect to the arbitration provisions in Section 252 of the Act, MFS notes that arbitration is fair when both parties have equal access to facts. Therefore, MFS believes that modest discovery should be permitted to ensure that both parties have access to basic information necessary to develop their positions. An exchange of documents relating to basic cost and technical issues, to the extent not already provided, ought to be required prior to the arbitration hearing.

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[93] *See* MFS Reply Comments, CC Docket No. 95-45, at 14-15 (filed May 7, 1996).

[94] MFS understands that loops to customers located within 18,000 feet of a central office generally can be conditioned to meet the CSA standards, and that about 80% of all customers are located within this radius. The requesting carrier should have the option of interconnecting to these loops at the ILEC central office, and of collocating whatever equipment is required to provide advanced telecommunications capabilities over these loops. For the fraction of loops extending farther than 18,000 feet from the central office, it may be necessary for ILECs to offer additional points of interconnection that are closer to the end user, or to deploy additional equipment in their networks to comply with the transmission capacity requirements.

MFS urges the Commission to establish appropriate and sufficiently detailed rules and procedures to ensure the fair and expeditious handling of the arbitrations, and the use of knowledgeable arbitrators. Such procedures should include, among other things, a precise timeline for exchange of limited discovery; a formal, expedited hearing, with precise limits and allocations of time; specification of the standards, legal or otherwise, upon which the arbitrator's decision shall be based, and the remedies and relief available to the arbitrator; a written statement of the arbitrator's decision; and a clear statement as to the scope of confidentiality of the statements made and documents offered in arbitration.

The arbitration should be limited to the specific parties to the agreement under review. Third parties should not be permitted to participate, since they would unduly delay and burden the process.

B. Section 252(i) (¶¶ 269-272)

MFS agrees with the Commission's observation in para. 269 that Sec. 252(i) was intended by Congress as an important tool to prevent discrimination by ILECs. The Commission should therefore avoid any interpretation of this subsection that would impair its beneficial effects. As argued in previous sections, the availability of all network elements on an unrestricted and nondiscriminatory basis must be a central element in a market-driven pricing strategy. This requires that all agreements specify the terms and conditions for access to unbundled network elements on a discrete, element-by-element basis, and that other carriers be allowed to obtain access to any discrete element on the same terms and conditions. An agreement may not contain "blanket" terms and conditions that effectively require a third party to incur other obligations or waive rights as a condition of access to a particular network element at a particular rate.[95] Therefore, the Commission's rules should specify that Sec. 252(e)(2)(A) prohibits approval of any negotiated agreement that attempts to limit the rights of third parties under Sec. 252(i), either directly or by incorporating terms and conditions that are so narrowly tailored that no other carrier could satisfy them as a practical matter; and that any arbitrated agreement having such a result would be contrary to the nondiscrimination requirements of Secs. 251(c)(2), (c)(3), (c)(4), (c)(6), and 252(d)(1).

IV. CONCLUSION

For the reasons set forth in the preceding Comments, the Commission should proceed expeditiously to adopt comprehensive rules establishing a nationwide minimum set of requirements for the interconnection, unbundled access, reciprocal compensation, and other arrangements that must be offered by ILECs pursuant to Sec. 251. These minimum standards should not preclude a State from adopting more rigorous requirements pursuant to its own rules and policies.

The Commission's rules should require ILECs to provide interconnection at any point in their network requested by another carrier, unless the ILEC carries the burden of demonstrating technical infeasibility. The requesting carrier should be entitled to choose the means of interconnection, including (but not limited to) physical or virtual collocation or a meet-point arrangement. Specific installation intervals, repair standards, and service quality requirements should be incorporated in the rules. The Commission should modify its physical and virtual collocation policies, as outlined

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[95] An example of such a "blanket" condition might be a provision stating that a carrier qualifies for a lower rate for a particular network element only if buys certain quantities of other elements as well.

above, both to conform to the new requirements of the Act and to address problems that have arisen under the previous rules.

Access to unbundled network elements should be made available on the same basis as interconnection. However, pure resale carriers should not be permitted to pick and choose between unbundled elements and wholesale services; the Act requires that pure resellers use wholesale services while facilities-based carriers have access to unbundled elements. As in the case of interconnection, specific service requirements should be prescribed. This is most important in the case of the unbundled loop, which has the strongest "bottleneck" characteristics of any network element, but should be provided for other elements as well. The Commission should adopt a coherent set of unbundling, resale, and pricing standards to assure market-driven pricing of unbundled network elements, rather than delve into the limitless complexity of LRIC studies or adopt the inferior and unreliable "proxy" approach. And, the Commission should pre-empt any State pricing schemes that are inconsistent with the pricing directives of the Act, such as Texas' requirement for usage-sensitive pricing of unbundled loops.

The Commission should effectuate the resale provisions of the Act by prescribing rules that strictly limit the ILECs' opportunities to place limitations or conditions on resale of any telecommunications service. Unlimited resale is one of the key components of the market-driven pricing strategy proposed in these Comments. For the same reason, however, the Commission should be hesitant to interfere with market-driven pricing by mandating excessive discounts for wholesale services. These discounts should be limited to a narrowly-drawn concept of net avoided costs, and the Commission should rely on market forces to determine the proper level of wholesale rates as competition emerges.

The rules should require that reciprocal compensation arrangements for transport and termination of traffic be based on a reasonable approximation of the economic cost of performing these functions using optimal technology. Reciprocal compensation should be provided under a single, symmetric, usage-sensitive rate, which should be capped at one-half the measured service rate offered to end users. Although the Act permits bill and keep arrangements, it does not require them, and the Commission should not encourage these arrangements because they are not consistent with economic efficiency.

In addressing all of these issues, the Commission should bear in mind that the fundamental purpose of Sec. 251 is to promote local exchange competition, and particularly facilities-based competition; and that the 1996 Act was intended by Congress as a sweeping overhaul of telecommunications law rather than a mere incremental change. The Commission should not hesitate to take bold steps and to discard old regulatory practices and techniques (such as embedded cost analyses) that are inconsistent with the new statutory regime. Rather, it should take this rare opportunity to craft an entirely new regulatory paradigm, and enable the next generation of American consumers to reap the benefits of full-fledged competition throughout the telecommunications industry.

Respectfully submitted,

Andrew D. Lipman
Russell M. Blau
SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500
Fax (202) 424-7645

Attorneys for
MFS Communications Company, Inc.

David N. Porter
Vice President, Government Affairs

MFS COMMUNICATIONS
COMPANY, INC.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7709